Partial Justice:

The Peril of Judicial Elections

The Committee for Economic Development Subcommittee on Money in Politics

2011

Introduction

In the American system of justice, judges are expected to perform their role apart from the "political thicket," free of political pressure and indifferent to public opinion.[1] Yet today, in most states, this basic requisite of independent and impartial administration of the rule of law is imperiled. Where judges hold or retain office by election, the independence of the judiciary is at risk. Elections encourage judges to raise campaign contributions and appeal to voters. They provide special interests with substantial opportunities to politicize judicial decisions and influence judicial behavior. Elected judges find it hard to avoid becoming entangled in the political thicket. Selection by election does not befit the role of a judge in our legal process.

An alarming number of judicial elections have become politically charged and divisive contests, characterized by increasingly large campaign expenditures and interest group electioneering. In many instances, judicial campaigns have come to resemble those waged by partisan politicians, contests in which fundraising is considered a key to success and expensive television advertising the principal means of communicating with voters. Most of the money raised by judicial candidates comes from attorneys and parties who may later appear before them in court or who have a particular interest in the outcome of adjudications. Interest groups are also increasingly involved, sometimes spending more than the candidates themselves in hopes of influencing judicial decisions. Consequently, judicial elections are too often serving as arenas of conflict for competing interests who hope to elect judges whom they perceive to favor their views—or oust those who do not.

Judicial elections are antithetical to the concept of an independent judiciary. The function of the judiciary is to apply and interpret law, not espouse the cause of a particular constituency or consider the electoral consequences of a ruling when making a decision. Our legal system is predicated on the idea that judges will serve as neutral and dispassionate arbiters and administrators, who treat all who come before them similarly and base their decisions solely on the law and the facts of the matter before them. This is the only means of guaranteeing that each case that comes before a court is decided through a principled deliberation with no predisposition as to the correct legal outcome. In this way, the exercise of judicial authority promotes respect for the law, thereby inspiring voluntary compliance with legal norms.

The business community depends on the integrity and evenhandedness of the judicial system in making financial and investment decisions. An impartial judiciary is a critical element of a stable and prosperous business climate. As CED and its partner companies have noted elsewhere, "The belief among the American business community that justice is evenhanded affects economic decisionmaking, reduces the perception of risk, and encourages consistent adherence to transparent rules of law. The integrity of the American judicial system allows economic actors to rely on existing legal frameworks in weighing the potential costs and benefits of business and investment decisions."[2] Indeed, research analyses indicate that where private parties reasonably expect that judges will enforce contracts and settle disputes impartially, transaction costs are lower, which in turn leads to a greater number of welfare-enhancing transactions.[3]

Accordingly, the business community is deeply concerned about the damaging effects of judicial elections on the independence and integrity of our state courts. The risk of donor interests and political pressures influencing judicial behavior is too great to ensure unbiased outcomes or to maintain public confidence in the fairness of the courts. In 2007, CED commissioned a poll by Zogby International that found that four out of five business leaders worry that campaign contributions have a major effect on decisions rendered by judges.[4] The survey also revealed near universal concern that campaign contributions and political pressure will make judges accountable to politicians and special interest groups rather than the law. The broader citizenry shares these doubts about the ability of judges to remain impartial. A 2009 *USA Today*-Gallup poll, for example, found that 89 percent of those surveyed believed that campaign contributions were problematic and could influence a judge's rulings.[5]

Our concern about the effects of judicial elections is reflected in the U.S. Chamber of Commerce's Institute for Legal Reform's State Liability Rankings Study. Two-thirds (67 percent) of the businesses polled by the Chamber of Commerce reported that the litigation environment in a state is likely to impact important business decisions at their companies, including such basic decisions as where to locate and where to do business. This compared to 63 percent who expressed this view in 2009 and 57 percent a year earlier.[6] Not surprisingly, in the overall rankings of state litigation environments covering the period from 2002-2010, seven of the eight states considered to have the worst litigation environments elect judges to office in the first instance, including four that hold partisan elections. Of the top eight states considered the best environments, only one holds contested elections for judges.

Business leaders are not alone in voicing such concerns. Judges themselves are warning of the consequences of current trends in judicial campaigning. In 2009, the Conference of Chief Justices, which represents 57 chief

justices from every state and U.S. territory, noted: "As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled."[7] Former U.S. Supreme Court Justice Sandra Day O'Connor has also warned of a decline in public confidence in the impartiality of the courts. In her view, "This crisis of confidence in the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold."[8]

We are not surprised by these dire warnings. What we do find surprising is the lack of broader public outrage over the state of judicial elections. CED first began to highlight the deleterious effects of judicial elections more than a decade ago and in 2002 issued a comprehensive study, *Justice for Hire: Improving Judicial Selection*, which urged reforms that would move away from judicial elections and towards merit-selection approaches.[9] Since that time, judicial races have become more expensive and more polarized, a trend that will only be exacerbated by the Supreme Court's recent decision in *Citizens United* v. *Federal Election Commission*, which permits unlimited corporate and labor union spending in judicial elections. The experience of recent elections and the prospects ahead demonstrate the urgent need for fundamental reform.

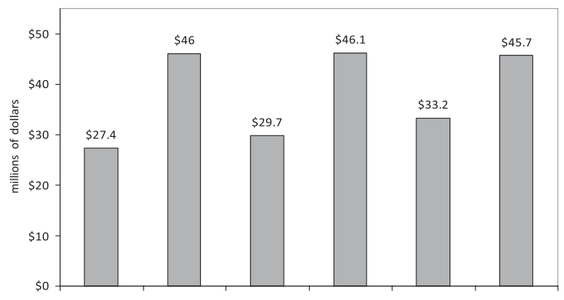
Money in Judicial Elections

The vast majority of judges who preside in state courts are placed in office or remain in office by winning an election. In 38 states, most appellate and trial jurisdiction judges are either selected in the first instance by competing in a partisan or nonpartisan election, or are initially appointed to office and then required to stand for election after a specified term in order to retain office. In the past, these elections tended to be noncontroversial and candidates rarely faced a major challenge. But a transformation has taken place in judicial elections, resulting in costlier, more competitive, and more controversial campaigns.

The flow of money in judicial elections has surged in the past decade, as candidates for the highest state courts raised larger and larger campaign war chests and interest groups poured increasingly large sums into judicial races. No longer a focal point of attention only for members of the trial bar, judicial elections in some states have become high-dollar battles waged by trial lawyers and unions, business groups and conservative organizations, party committees and PACs. Moreover, highly politicized and high-spending campaigns are spreading throughout the states, and appearing in retention elections or lower level judicial races in jurisdictions where judges on the ballot have issued opinions that a well-funded interest opposes. The result is an intensifying judicial arms race in which candidates face growing pressure to raise money and interest groups are encouraged to mount campaigns in support of their preferred candidates.

A recent report issued by Justice at Stake, Brennan Center for Justice, and National Institute on Money in State Politics, which represents the most comprehensive analysis of the financing of judicial elections to date, documented the growth in spending over the past decade.[10] Their analysis revealed that spending in state supreme court elections more than doubled in the past decade, rising to a total of $206.9 million in the period from 2000-2009, as compared to $83.3 million in the period from 1990-1999. Since the 1998 election cycle, judicial candidates have raised substantial sums, with the total for each biennium ranging from $27 million to $46 million. Fundraising by judicial candidates has been most pronounced in partisan contests. From 2000-2009, candidates in the nine states that hold partisan elections raised $154 million in total, while candidates in the thirteen states that hold nonpartisan elections raised $51 million.

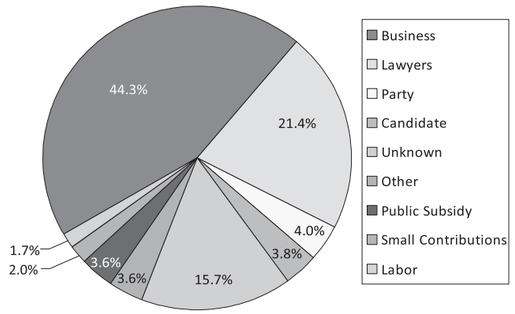
Fundraising in State Supreme Court Elections, 1998-2008



Source: Justice At Stake, Brennan Center, National Institute of Money in Politics,The New Politics of Judicial Elections, 2000-2009 (2010).

Most of the money contributed to judicial contenders comes from trial attorneys and members of the business community. No other social or economic group matches the level of their donations. For example, in 2006, 88 judicial candidates raised a total of $34 million. The National Institute on Money in State Politics has been able to identify the interests associated with 84 percent of these contributions. Of the $34 million total, 44 percent ($15.2 million) came from business donors, while 21 percent ($7.4 million) came from attorneys.[11] The next largest identifiable sources of funding were the candidates themselves and political parties, with each responsible for about 4 percent of the monies raised. Small contributions from individuals accounted for only 2 percent ($681,000) of the money received by these candidates.

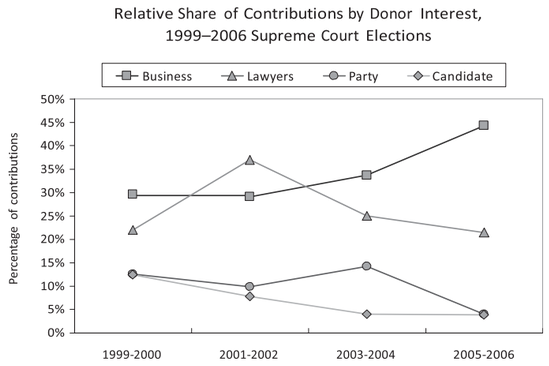
Source of Contributions to 2005-2006 Supreme Court Candidates



Source: Justice at Stake, The New Politics of Judicial Elections 2006.

Contributions from attorneys and members of the business community have been major sources of money in judicial campaigns for some time. Some state courts actually became known publicly as favoring plaintiffs, the perceptions fueled by large campaign contributions to individual judges by members of the trial bar.[12] After several years of such contributions, business interests began to fight back, led by the U.S. Chamber of Commerce and its state affiliates. As a result, members of the business community are responsible for a growing share of judicial campaign money, and, although lagging behind attorneys' donations ten years ago, provided more than twice the sum contributed by members of the bar in 2006.

Relative Share of Contributions by Donor Interest, 1999–2006 Supreme Court Elections



Source: Justice at Stake, The New Politics of Judicial Elections, 2000-2006.

Contributing money to candidates is only one way those with stakes in judicial elections attempt to influence outcomes. In recent years, interest groups and political parties have spent millions of dollars independently in support of the candidates of their choice. For example, in the 2007 and 2008 judicial races in Wisconsin, Wisconsin Manufacturers and Commerce, a business-backed organization, spent more than $2 million on television ads in judicial races. Greater Wisconsin Committee, a group backed by labor unions and the Democratic Party, took the other side in these contests and spent $1.4 million. In the Michigan Supreme Court race, the state Democratic Party spent $1.1 million on television advertising, while the Michigan Chamber of Commerce spent more than $800,000. In Alabama, the state Democratic Party gave more than $1.6 million to the Democratic candidate, while the Virginia-based Center for Individual Freedom spent more than $900,000 in support of the Republican candidate who narrowly won.[13]

The flow of money in Alabama's 2008 judicial race is worth noting, since it offers a troubling example of the influence partisan and special interest groups can exert in judicial elections. In this contest, 61 percent ($3.3 million) of *all* the contributions *and* expenditures made in the campaign ($5.4 million) came from just four sources: Alabama Democratic Party (contributed $1.6 million), Center for Individual Freedom (spent $965,529), Alabama Civil Justice Reform Committee (contributed $434,079) and the Business Council of Alabama (contributed $275,200).[14]

The effect such spending can have on the composition of courts was evident in the 2010 Iowa elections. Iowa Supreme Court justices are subject to periodic retention elections. These retention votes generally draw relatively little interest. Not in 2010. In 2009 the Iowa Supreme Court issued a unanimous decision allowing same-sex marriage, a ruling that provoked fierce opposition from groups who disagreed with the Court's view. In 2010, three justices faced retention votes, and these elections became a lightning rod for interest group politicking.

The justices declined to form campaign committees and spend money to urge a "Yes" vote, concerned about the perceptions that such efforts might promote with respect to future rulings. Not so for their interest group opponents, who launched major campaigns against them. Iowa for Freedom, a group supported by the Mississippi-based American Family Association, and the National Organization for Marriage, a group based in Washington, D.C., spent more than $300,000 on television ads and other activities calling for removal of the three justices. Iowa for Freedom sponsored robo-calls to state voters, calling the election one of the "top 10" elections in the country and claiming that "Voting no on the retention of three Iowa Supreme Court justices will send a clear message that we are taking back control of our government from political activist judges." Another Washington-based political committee, Citizens United Political Victory Fund, targeted 250,000 Iowans, urging them to vote "No" through a telephone call recorded by 2008 Republican presidential candidate Mike Huckabee that declared, "The last thing

this country and especially Iowans need are activist judges who put their own self interests ahead of the common good." One member of Iowa's congressional delegation even jumped into the fray, touring the state to tell citizens to vote "No." As a result, all three justices were removed from office, making it the first time in Iowa history that a justice who stood for retention was defeated at the polls.[15]

The 2011 Wisconsin Supreme Court race stands as another striking example of the political forces that can shape the dynamics of judicial contests. An incumbent justice seeking reelection, who was generally perceived to be a conservative, faced an opponent who was generally perceived as a liberal. The race took place in the context of a deeply divisive political battle within the state, which was spurred by the Republican governor's effort to change the state's collective bargaining provisions for state workers as part of a broader effort to balance the state's budget. Collective bargaining reform was fiercely opposed by labor unions and Democratic legislators, and sparked weeks of public protests that drew national attention. The Supreme Court race became a proxy for this deeply divisive political battle, transforming what was expected to be a relatively easy reelection campaign for the sitting justice into a hotly contested, highly competitive campaign.[16] The stakes were especially great, since any action changing collective bargaining rights was expected to be challenged in court.

Consequently, interest groups on both sides poured millions of dollars into television advertising, with much of this advertising featuring negative attacks on the candidates. The Greater Wisconsin Committee, a group backed by labor unions and Democrats, spent more than $1.3 million in support of the challenger. The Issues Mobilization Council of the Wisconsin Manufacturers and Commerce, a business-backed organization, spent more than $900,000 on advertising in support of the incumbent, who also benefited from a combined $1.3 million of advertising sponsored by three conservative groups. In total, interest groups spent $3.6 million on advertising in the race, which was a record for a judicial race in Wisconsin.[17] In the end, the incumbent was reelected by a narrow margin, but the results were so close that a recount of the vote was conducted. This added further to the politically charged atmosphere that enveloped the race.

These examples are but a sample of the high-stakes battles that now take place in far too many judicial elections in far too many states. They document the conflicts of interest and political influence inherent in the new politics of judicial elections. The message of these elections is clear: judges who wish to remain in office need be mindful of the political consequences of their rulings and should be wary of rendering decisions that are at odds with popular sentiment or challenge the views of special interests. Judges who fail to abide this message are likely to face reprisal at the polls.

It is little wonder that many Americans now believe that campaign contributions affect the outcomes in courtroom decisions—and that many judges concur with this view.[18] As former Supreme Court Justice O'Connor has observed, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."[19]

Caperton and *Citizens United*: Greater Spending, Greater Problems

An especially egregious example of donor influence was highlighted in the U.S. Supreme Court case, *Caperton* v. *A.T. Massey Coal Company.*[20] In 2002, a West Virginia jury awarded $50 million to Hugh Caperton, owner of Harman coal mine, Harman Development Corporation, and other plaintiffs in a commercial dispute against Massey Coal. Massey appealed the verdict to West Virginia's Supreme Court of Appeals. One of the justices who participated in the appeals decision and voted with the majority in a 3-2 verdict to overturn the jury award was Justice Brent Benjamin. Justice Benjamin had rejected a recusal motion, despite the fact that he had received substantial campaign support from Don Blankenship, a Massey executive. In addition to contributing the maximum $1,000 directly to Benjamin's campaign, Blankenship spent $500,000 on television advertisements and direct mailings. He also contributed $2.5 million to an independent political group, "And For The Sake Of The Kids," which had targeted Benjamin's opponent, an incumbent justice, for a ruling he had supported in a probation case. Benjamin defeated the incumbent in a close election. Blankenship's $3 million total was more than the amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own campaign committee.

The question of whether the justice should have recused himself in this case as a matter of due process under federal constitutional law brought the case to the Supreme Court. In *Caperton*, the Court held that due process did require recusal. In rendering this decision, Justice Kennedy, writing for the majority, acknowledged the bias that can result from campaign spending: "[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[21] He further noted, "Just as no man is allowed to be judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required …recusal."[22] The Court, however, limited the reach of its ruling, noting that this was an "exceptional case" due to the relative size of Blankenship's expenditures.[23]

The Court's subsequent decision in *Citizens United* v. *Federal Election Commission* will only serve to increase the risk of bias recognized by Justice Kennedy and enhance the role of money in judicial elections. In a highly controversial 5-4 ruling, the Court declared that corporations (and by extension, labor unions) had the same right as individual citizens to spend money to advocate the election of candidates, so long as the spending was done independently of a candidate. The Court thus overturned decades of federal and state campaign finance law by ruling that corporations could use their treasury funds to make independent campaign expenditures. In reaching this decision, the majority concluded that independent expenditures do not pose a risk of corruption because no money is exchanged with a candidate, so there can be no *quid pro quo*. The Court therefore held that the government was justified in prohibiting corporate *contributions* to candidates, but not corporate *expenditures*.

Taken together, *Caperton* and *Citizens United* increase the risk of judicial bias by making judicial contests a target of an even more intensive spending arms race. Before *Citizens United*, twenty-four states prohibited corporations from spending monies from their treasuries to support candidates, and two (Alabama and New York) limited the amounts that could be spent. States that have already become judicial electoral battlegrounds, including Wisconsin, Michigan, Ohio, and Pennsylvania, were among the states that banned corporate spending. In these states, elections are likely to become even more costly and hard-fought. And other states that hold elections will increasingly follow suit, as well-funded interests will now be able to spend previously restricted funds advocating the candidates of their choice.

Citizens United unleashed corporations, labor unions, and interest groups that receive corporate or labor funding. These organizations will be allowed to raise and spend unlimited sums in judicial contests without restrictions on their funding. This virtually ensures a sharp increase in spending. It will also add to the pressures placed on businesses and their executives to make contributions to organizations involved in judicial campaigning. The threat this poses to the independence and fairness of state judicial systems is severe.

The decision in *Caperton* offers some hope of further litigation on the undue influence of money in judicial elections and stricter standards for recusal. Recusal resolves the problem of conflict of interest or bias that results from campaign donations, and is a remedy widely supported by the business community. The 2007 Zogby International survey conducted for CED found that 97 percent of the business leaders surveyed thought that judges should recuse themselves in cases involving parties who have contributed financially to their campaigns.

Recusal provides an effective and necessary means of avoiding bias or conflict of interest in those cases that may involve a campaign donor. But it is a limited remedy. While it protects against the worst abuses, it fails to resolve the underlying problems that are inherent in a system of selection by election.

A Business Agenda for Reform

Judicial independence is the cornerstone of fair, impartial and effective rule of law. An independent judiciary is an essential institution in a free society and necessary in a free market economy. But this ideal cannot be achieved when those who are entrusted to administer and protect the law are placed or remain in office by popular vote.

No system of judicial election can insulate judges from the barbs of the political thicket. Elections are designed to infuse politics into the law, to make judges accountable to electoral politics, and to encourage judges to be mindful of the views of constituents other than the law. They cast judges in a political role, and provide outside interests with ample opportunities to politicize judicial actions and influence judicial behavior.

Elections encourage citizens to view judges not as dispassionate guardians of the law, but as politicians with robes. This image has been promoted not only by the activity that takes place in election campaigns, but also by the Supreme Court, which has issued opinions that have blurred the distinction between judges and elected representatives, and struck down key protections that had been established to limit the political and partisan behavior of judges. In this regard, we find the decision in *Republican Party of Minnesota* v. *White* to be particularly harmful.[24] In this case, the U.S. Supreme Court ruled unconstitutional a canon of judicial conduct adopted by the Minnesota Supreme Court that prohibited a candidate for a judicial office from announcing his or her views on disputed legal or political

issues. This restriction was designed to safeguard against candidates announcing their positions on an issue before hearing or deciding a case. Yet the Court held that this protection did not serve to protect the impartiality of the judiciary and in a 5-4 ruling found this restriction to be in violation of the First Amendment. Following the Supreme Court decision, the U.S. Court of Appeals for the Eighth Circuit considered a number of other provisions of Minnesota's code of judicial conduct and held that restrictions on partisan political activities, including soliciting campaign contributions through direct mail or appeals to large groups, were also unconstitutional.[25]

The Supreme Court's decision and the legal challenges to judicial codes of conducts or canons that have followed in its wake have seriously undermined the protections needed to limit the political behavior of judges. In our view, restrictions on the political activities of judges and other standards of conduct for election campaigns constitute necessary safeguards for preserving the independence and impartiality of the judiciary. We do not share the view of the majority in *Republican Party of Minnesota* v. *White* on the value of canons of conduct in judicial elections and hope that this issue will be reconsidered in a future case.

CED is deeply concerned about the effects elections have on the integrity of courts and the public's confidence in the judicial process. We have concluded that appointment should be the basic principle that governs the selection of all judges. In our previous report on judicial elections, *Justice for Hire*, we set forth policy recommendations in accord with this principle. We continue to support these ideas. In particular, we strongly believe:

- All states should select judges through an appointment-based process. Specifically, states should adopt a commission-based appointment system without retention elections. In this approach, each state would establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. All appointments to judicial positions would be made from the lists of candidates prepared by the commission.

- Any system of judicial selection must include appropriate mechanisms for holding judges accountable for their performance in office. To facilitate periodic review and evaluation of judges, we support the creation of judicial performance evaluation commissions, similar to those now found in some states. All judges should serve for a limited term of office. At the end of this term, an independent judicial performance evaluation commission would conduct a comprehensive, objective review of a judge's performance in office and prepare an evaluation report and a recommendation as to reappointment. This information would be provided to the governor or other appointing authority in a state for use in making a decision on reappointment.

- Levels of compensation offered for judicial office can discourage highly qualified candidates from pursuing such service. State officials should review current salaries and ensure that appropriate levels of compensation are provided to judges at all levels. One method of conducting compensation reviews is through the use of official compensation committees comparable to those already used in many states to determine judicial salaries.

We acknowledge that most states will find it politically impracticable to move to a commission-based appointment system in the near future. A fully appointed judiciary requires a fundamental transformation of the judiciaries in most states. For those states who do not adopt an appointive system, we prefer the use of merit selection as an alternative to selection by popular vote. We prefer merit selection systems because they have the virtue of appointing judges in the first instance. We regard appointment as the grounding principle of judicial selection.

We also recognize that those states that currently hold elections are not likely to move to appointment-based approaches soon. Numerous bar associations, task forces, and judicial panels have called for reform of the judicial selection process and endorsed a move to appointment or merit-based systems. However, support for elections has remained strong; voters are not yet willing to relinquish their primary role in the selection process.

Accordingly, CED supports changes that will not resolve the core problem of judicial elections, but will make a major contribution towards addressing their most deleterious effects.

- Public financing should be established for judicial campaigns. We believe that public financing is the best available means of protecting the judicial process from the potentially corrupting effect of private donations.

- Judges should not be selected in partisan elections in which candidates run under party labels. This method of selection encourages the electorate to view judges as partisan advocates and engenders substantial electioneering by party organizations or their interest group allies on behalf of the party nominee.

- Lengthening terms is a necessary step to strengthen the caliber and independence of state courts. Judges should serve terms of office long enough to safeguard against a need to regularly seek reelection. As a general rule, the length of term for justices on the highest court in a state should be a minimum of twelve years and the term for trial and appellate court judges a minimum of eight years. Longer terms will provide a better balance between the principles of judicial independence and accountability than those commonly found in many current state systems.

- States should establish judicial performance evaluation commissions, similar to those recommended for appointed judges. Commission evaluations can serve as a means of improving the information available to voters in states that hold elections.

CED believes that evolving campaign tactics and the Supreme Court's recent decision in *Citizens United* will make a bad system even worse in states that hold judicial elections. We urge public officials, members of the business community, judges, members of the legal profession, and community leaders in the states to join in our efforts to increase public understanding of the importance of an independent judiciary and the consequences of judicial elections. We call upon these leaders to work together to initiate urgently needed reforms before the rule of law is further eroded by the perception that justice is for sale.

Memorandum of Dissent

Roderick Hills

My first objection is that the Policy and Impact Committee did not have an adequate opportunity to discuss the draft. At our Committee meeting this Statement on judicial elections was by agreement to be split from the work on legislative elections. There was no discussion of this draft.

My second objection is that the Statement does not sufficiently distinguish itself from our "Justice for Hire" Statement issued in 2002. The failure to state clearly the differences in the two Statements makes it impossible to understand what
has happened in 9 years that causes CED to change its recommendations.

Third, the Statement makes little difference between retention elections (where a judge simply asks to be reappointed), contested elections where the judge runs against other candidates, and political elections where the party affiliation of the candidates is listed.

I also believe the Statement too easily accepts state funding of judicial elections as a satisfactory solution to the problem. In "Justice for Hire" we also recommended public funding of elections. However, two of our Trustees, Patrick Gross and Edmund Fitzgerald, objected to that recommendation:

> ***"But public funding would not address many of the shortcomings of judicial elections . . . : they may only be a crutch, one with severe implementation problems. This is a far less desirable outcome and we should hesitate to embrace it."***

In the past 9 years we surely have learned even more about the problems of public funding of elections.
In "Justice for Hire" we suggested that the diversity jurisdiction of the federal courts might be expanded to protect out of state defendants from the jurisdiction of judges who are overly dependent on lawyers or companies who have contributed to their reelection campaigns. We could at the very least reconsider that issue. In 2002 we called for a "broad public dialogue on the question of judicial selection." This new statement offers no new ideas.

I particularly object to the somewhat cavalier fashion in which the Statement calls for the overthrow of the Supreme Court's decision, in the ***Minnesota*** case, that said a state court judge cannot be restricted from making public statements about matters that may come before his or her court. A freedom of speech decision of such importance deserves far more respect. We have a number of constitutional scholars who are CED Trustees. They at least should have been given an opportunity to offer their views of the matter to our Committee.

Finally, much more attention should have been given to the use of professional rules or codes of conduct to disqualify judges who have received campaign help from a party before their court and to prohibit lawyers from appearing before judges to whom they have given significant financial support.

CED Money in Politics Subcommittee

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Missouri House of Representatives

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Notes

1 Pamela S. Karlan, "Comment: Electing Judges, Judging Elections, and the Lessons of *Caperton*," Harvard Law Review 123 (November 2009), 80.

2 Brief of Amici Curiae the Committee for Economic Development, Intel Corporation, Lockheed Martin Corporation, PepsiCo, Wal-Mart Stores, Inc., Defense Trial Counsel of Indiana, The Illinois Association of Defense Counsel, and Transparency International-USA in Support of Petitioners, *Caperton* v. *Massey Coal Company*, U.S. Supreme Court, 08-22 (2009). A copy of this brief can be found on the CED website at http://www.ced.org/images/library/reports/justice_for_hire/amicusbrief09.pdf (accessed April 5, 2011). The passage cited is at p.8.

3 Ibid., 12. See also, Lars P. Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19 (2003), 499.

4 Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges*, May 2007. The findings of this survey are available on our website at http://www.ced.org/images/content/events/judicial/zogby07.pdf (accessed March 26, 2011).

5 Cited in "Judges for Sale," *Washington Post*, editorial, August 23, 2010.

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